

No. 15835.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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RICHARD DOUGLAS FURNISH,

*Appellant,*

*vs.*

THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF  
CALIFORNIA,

*Appellee,*

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Petition to Review a Decision of the United States District  
Court.

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## APPELLANT'S REPLY BRIEF.

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**APPELLANT'S CLOSING BRIEF.**

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**Jurisdiction.**

Appellee's primary contention is that the United States District Court does not have jurisdiction over the subject matter.

However, Section 1651, Title 28, *United States Code*, provides:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. . . ."

Section 2201, Title 28, *United States Code*, provides:

"In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration. . . ."

Section 2283, Title 28, *United States Code*, provides:

“A court of the United States may not grant an injunction to stay proceedings in a State Court EXCEPT as expressly authorized by Act of Congress, OR WHERE NECESSARY IN AID OF ITS JURISDICTION OR TO PROTECT OR EFFECTUATE ITS JUDGMENTS.” (Emphasis added.)

The instant action seeks to declare the rights of the appellant and to restrain an administrative State Board; it does not seek to restrain a State court primarily. Therefore, the instant action does not come within the prohibition preventing a Federal court from granting injunctive relief.

A Federal court is not prohibited from restraining and enjoining conduct of administrative proceedings before State bodies or by State bodies.

*City of Fresno v. Edmonston*, 131 Fed. Supp. 421, 424, 425 (D. C. Cal., 1955).

A Federal Court may restrain State Commissions which are not courts.

*Louisiana Railroad Commission v. Texas, etc. R.R. Co.*, 144 Fed. 68, 72.

In any event, the Federal court under Section 2283 of Title 28, *United States Code*, can act to protect or effectuate its judgments.

The Federal court had authority to enjoin filing or prosecution of action in State courts by a City and its Board of Commissioners, and grant relief prayed for if circumstances were found to so justify.

*Browder v. City of Montgomery*, 146 Fed. Supp. 127, 129 D. C. Ala., 1956).

An injunction may be issued by a Federal court to restrain State proceeding seeking to interfere with property in the custody of the Federal Court.

*O. D. Jennings & Co. v. Buterbaugh*, 89 Fed. Supp. 553, 556 (D. C. Pa.).

In the instant case, we do not have property in the custody of the Federal Court, but we do have an appellant who entered a plea of *nolo contendere* in a Federal action, and was subjected to the jurisdiction of the Federal Court.

The United States District Court had authority to stay proceedings in a State court in aid of its jurisdiction and to protect and effectuate its judgment in a bankruptcy case.

*R. F. C. v. Jacksonville BlowPipe Co.*, 244 F. 2d 394, 398.

A Federal court can exercise jurisdiction to prevent the trial of a defendant by a State court where the trial would invade constitutional rights, and such jurisdiction can be exercised by way of injunction.

*Keegan v. State of New Jersey*, 42 Fed. Supp. 922, 924 (D. C. N. J., 1941).

The cases cited by appellee in its brief refer in the main to sets of facts dealing with State actions. For example, the case of *Norwood v. Parenteau*, 228 F. 2d 148, cited on pages 12 and 13 of appellee's brief, refers to an optometrist who was found guilty of unprofessional advertising, in violation of the rules of the South Dakota State Board of Examiners in Optometry.

The primary distinction between the cases cited by appellee and the instant case is that appellee's citations refer to initial State actions, or an attempt by individuals to re-

litigate State actions, whereas appellant's case is one involving a controversy over the appellant's rights under a plea of *nolo contendere* in a Federal action; the State Board of Medical Examiners and the California State statute seek to use the *nolo contendere* plea in a State proceeding, which is separate and distinct from the Federal criminal action where the *nolo* plea was entered.

It is well settled, as pointed out in appellant's Opening Brief, pages 7-8, that a plea of *nolo contendere* cannot be used in any other case. The appellee seeks to use the *nolo* plea as the basis for its action suspending the appellant from the practice of medicine, even though no moral turpitude was involved. (Stip.)

The State Board of Medical Examiners has challenged the decisions holding that a plea of *nolo contendere* cannot be used in any other case; appellee has challenged the Federal court's action in permitting a *nolo* plea to be entered by the appellant, and has challenged the finding of the Federal District Judge that a plea of *nolo contendere* does not carry with it any civil penalties. [Tr. of R. pp. 5-6.]

Appellant is not seeking to have the Federal court relitigate the litigation of the State courts. The appellant does seek to determine whether the Federal court can enjoin an administrative State body from using a *nolo* plea for the purpose of suspending a medical doctor from the practice of medicine.

It should be noted that the action involving the appellant in the Federal court preceded the action taken by the State Board.

It is respectfully submitted that this is a case where the Federal court has jurisdiction to decide the action on its



merits and to determine if the circumstances are such as to justify enjoining the State Board of Medical Examiners from suspending the appellant from the practice of medicine. To hold otherwise would mean that a *nolo* plea does carry civil penalties and that a State statute may so provide.

Accordingly, it is respectfully submitted that the decision of the District Court should be reversed and it should exercise its jurisdiction and permit the matter to proceed to trial on its merits.

Respectfully submitted,

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